(6)

No. 92-344

In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, Commissioner, Immigration and Naturalization Service, et al.,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

OF COUNSEL

STEVEN M. SCHNEEBAUM
JANELLE M. DILLER
INTERNATIONAL HUMAN RIGHTS LAW GROUP
1601 Conn. Ave., N.W.
Washington, D.C. 20009
(202) 232-8500

WILLIAM T. LAKE
CAROL F. LEE
W. HARDY CALLCOTT*
SUSAN P. CRAWFORD
KATARINA MATHERNOVA
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Amicus Curiae

* Counsel of Record

December 21, 1992

33 pp

QUESTION PRESENTED

Whether a judicially created canon of statutory construction against extraterritorial application of United States law justifies implying a territorial limitation on the application of 8 U.S.C. § 1253(h)(1), although this section focuses on conditions and events in other countries and does not create any possible conflict with foreign law.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

Page

STATUTORY PROVISIONS

MISCELLANEOUS

No. 92-344

In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, Commissioner, Immigration and Naturalization Service, et al.,

Petitioners,

v.

HAITIAN CENTERS COUNCIL, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The International Human Rights Law Group ("IHRLG") is a nonprofit legal organization that promotes the observance of international human rights. Founded in 1978, the IHRLG provides legal assistance and information on international human rights law and has consultative status with the United Nations Economic and Social Council. With the assistance of attorneys who contribute their services, the IHRLG offers its expertise on a pro bono basis to individuals and groups concerned with respect for human rights. In United States courts, the IHRLG has participated as *amicus curiae* in many cases urging United States

compliance with international human rights norms, and in particular with norms concerning political refugees.[1]

The IHRLG urges affirmance of the decision of the court below. In affirming that decision, the United States will reaffirm its commitment to universally recognized principles of human rights and fundamental freedoms. The IHRLG has obtained the written consent of the parties to file this brief.

SUMMARY OF ARGUMENT

8 U.S.C. § 1253(h)(1) forbids the U.S. government to return aliens to countries where they would face persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion. The Second Circuit below held that the plain language of this statute proscribes the government's present policy of interdicting Haitians on the high seas and returning them to Haiti without regard to the threat of persecution there. In defense of its policy, the government urges this Court to apply a "presumption" against extraterritorial effect of U.S. statutes. But the canon of construction to which the government refers is merely a tool of statutory analysis, is not as rigid as the government claims, and is useful only where it accurately reflects legislative intent.

The rigid "presumption" urged by the government would upset settled expectations in numerous areas of law.

---

[1] For example, recently the IHRLG has submitted briefs *amicus curiae* to this Court in *Saudi Arabia v. Nelson*, 923 F.2d 1528 (11th Cir. 1991), *cert. granted*, 112 S. Ct. 2937 (1992); *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992); *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991) ("*Aramco*"); and *INS v. Doherty*, 111 S. Ct. 719 (1991). In the related case of *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), the IHRLG submitted a brief *amicus curiae* to the court of appeals.

In many cases involving antitrust, criminal law, intellectual property, securities law, civil discovery, and other areas of law, this Court and the lower federal courts have held that generally worded statutes have application outside the territorial limits of the United States.

Although this Court has determined on occasion that a statute without express extraterritorial reach applies solely within U.S. territory, the Court has done so only when it concluded either that Congress was concerned primarily with domestic affairs in enacting the statute in question, or that Congress sought to avoid conflict with foreign laws. Neither conclusion is appropriate here, for several reasons. The statute reflects the inherently international concern of Congress with the return of aliens by the U.S. government to countries where they may face persecution. It does not create any likelihood of conflict with foreign laws, for it regulates immigration into the United States and imposes constraints only on the U.S. government's own operations on U.S. flag vessels. Finally, this case concerns government conduct on the high seas, where there is no sovereign with which a conflict could arise.

Even if this Court does apply a "presumption" against extraterritoriality in interpreting 8 U.S.C. § 1253(h)(1), that "presumption" is easily overcome by the plain language of the statute and the text of the 1980 amendments.[2]

[2] This brief is focused on a discussion of the extraterritorial application of 8 U.S.C. § 1253(h)(1) (1989). Other briefs filed in this action will address in detail the legislative history of the statute.

I. THE JUDICIALLY CREATED CANON AGAINST EXTRATERRITORIAL APPLICATION OF U.S. LAW IS MERELY AN AID TO DETERMINING LEGISLATIVE INTENT

The merits of this case concern an issue of statutory construction: Does 8 U.S.C. § 1253(h)(1) forbid the government's policy of returning refugees to Haiti without any regard to the threat of persecution awaiting them there?[3] In support of its policy, the government contends that a rigid "presumption" against extraterritorial effect of all U.S. statutes prohibits the application of 8 U.S.C. §1253(h)(1) to its actions.

The canon of statutory construction on which the government relies, however, is purely a judicial creation. Such canons have vitality only to the extent they accurately reflect the intent of Congress.[4] "Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1 of the Constitution."[5] As the Chief Justice has explained in a case concerning the extraterritorial application of a U.S. statute:

> Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. They do not solve the special difficulties in construing a particular statute. The variables

[3] 8 U.S.C. § 1253(h)(1) (1989) reads: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."

[4] *Cf. Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672 n.3 (1986) (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 304, 351 (1984)) (a presumption is controlling only "'where substantial doubt about the congressional intent exists'").

[5] *United States v. Albertini*, 472 U.S. 675, 680 (1985).

render every problem of statutory construction unique.[6]

Indeed, the government's brief, in discussing a different presumption, recognizes this same point: a presumption about legislative intent is just a presumption, and is not to be applied in a strict evidentiary sense.[7] Uncritical reliance on a judicially created doctrine, without examining whether it accurately reflects the intent of Congress at the time it enacted a particular statute, would be inconsistent with this Court's function of neutrally interpreting the law.[8]

•

•

[6] *Weinberger v. Rossi*, 456 U.S. 25, 28 (1982) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)) (citations omitted).

[7] Petitioner's Brief ("Br.") at 14 n.7, citing *Block v. Community Nutrition Inst.*, 467 U.S. 340, 341, 350-51 (1984) (presumption in favor of judicial review of administrative action).

[8] The government seeks to bolster its assertion of a "presumption" against extraterritoriality by reference to cases concerning presidential authority over foreign policy. But these decisions are irrelevant here; this case concerns the interpretation of a statute and Congress's intent when it passed that statute. In any event, because the position asserted by the government is contrary to the plain language and history of the statute, the discretion of the executive branch is at "its lowest ebb." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

II. THIS COURT HAS ADDRESSED THE EXTRATERRITORIAL REACH OF U.S. LAWS ON A STATUTE-BY-STATUTE BASIS

A. In Many Instances, This Court Has Applied Generally Worded Statutes Extraterritorially

It is not accurate to assert, as does the government, that the courts have uniformly presumed in all areas that U.S. law does not apply outside of U.S. territory.[9] Rather, this Court and the lower federal courts have carefully examined each statutory scheme before deciding whether a particular statute applies outside this country. Applying the government's rigid presumption without regard to its appropriateness to each particular statute would not only be unfaithful to the intent of Congress, but would also upset settled expectations in many different areas of law.

It has long been established that international law imposes no absolute limits on U.S. jurisdiction.[10] This Court has repeatedly recognized that Congress may legislate extraterritorially, and the Court's role is simply to

[9] Petitioner's Brief ("Br.") at 27 (requiring a "'clearly expressed, affirmative intention' by Congress" in order for this presumption to be overcome). In *Aramco* the government took a different position from that it urges here: "Congress need not express its intent to regulate outside the United States in any particular way. . . . [B]road jurisdictional language suffices to sustain extraterritorial applications of federal statutes that prevent evasion of the thrust of the laws of the United States . . . beyond our borders." Brief for the EEOC at 10 (citations and interior quotes omitted).

[10] The canon of statutory construction to which the government refers had its origin in the long discredited notion that legislation can have no effect beyond territorial boundaries. *Compare Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) *with International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (overruling *Pennoyer*).

interpret statutes to assess their intended scope.[11] In making this assessment, this Court has concluded in a limited number of cases that certain generally worded U.S. statutes apply only within U.S. borders. As discussed in Section III below, it has done so only in circumstances that are inapplicable to 8 U.S.C. § 1253(h)(1). In numerous other instances, this Court has held that generally worded federal statutes have extraterritorial application.

U.S. antitrust laws contain only general language with no clear statement that they apply outside of this country. In *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909), this Court held that the antitrust laws could not be applied to conduct occurring abroad. However, this Court overruled that decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962),[12] and has repeatedly cited with approval cases holding that the Sherman Act applies to conduct abroad that has effects in the United States.[13] In both government enforcement actions[14] and private damage

---

[11] *Aramco*, 111 S. Ct. at 1230; *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 381 (1948).

[12] This Court characterized *American Banana* as having been "substantially overruled" by *Continental Ore* in *W.S. Kirkpatrick & Co. v. Environmental Technonics Corp.*, 493 U.S. 400, 407 (1990). *See also United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927) (applying antitrust laws to conduct outside of U.S.).

[13] *See United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), *cited with approval by Continental Ore*, 370 U.S. at 704-05; *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 n.16 (1952); *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 114 n.8 (1969). *Accord* Restatement (Third) Foreign Relations Law of the United States § 415 (1987); Department of Justice, Antitrust Enforcement Guidelines for Int'l Operations 29-34 (1988).

[14] *See, e.g.*, Department of Justice, *Japanese Bid Rigging Case Settlement* (Dec. 19, 1989) (press release), *reprinted in* 7 Trade Reg. Rep. (CCH) ¶ 50,028 (Feb. 6, 1990); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *In re Grand Jury Investigation of the Shipping Indus.*, 186 F. Supp. 298, 309-10 (D.D.C. 1960); *In re Investigation of World Arrangements with Relation to the Prod., Ref., Transp. & Distrib. of Petroleum*, 13 F.R.D. 280, 284-85 (D.D.C. 1952). Earlier this year, the Department of Justice announced that it was prepared to challenge the anticompetitive behavior of foreign companies or cartels whose behavior limits or interferes with the ability of U.S. exporters to compete in an overseas market. Department of Justice, *Justice Department Will Challenge Foreign Restraints on U.S. Exports Under Antitrust Laws* (Apr. 3, 1992) (press release), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,108 (Apr. 14, 1992).

actions,[15] settled law now establishes that the antitrust laws can apply to conduct occurring outside this country.

This Court has held that generally worded federal criminal statutes can apply to conduct outside the United States.[16] Extraterritorial application of U.S. law is particularly important in the area of criminal narcotics enforcement, where the lower federal courts have routinely applied generally worded statutes to conduct outside this country despite the absence of any clear statement of extraterritorial

---

[15] *See, e.g., Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (1976), *aff'd after remand*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1291-92 (3d Cir. 1979); *Montreal Trading, Ltd. v. Amax, Inc.*, 661 F.2d 864, 869-70 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982). *See also In re Insurance Antitrust Litigation*, 938 F.2d 919, 931-34 (9th Cir. 1991), *cert. granted sub nom. Merrett Underwriting Agency Mgt., Ltd. v. California*, 113 S. Ct. 52 (1992), in which the United States as *amicus curiae* supported the Ninth Circuit's extraterritorial application of the antitrust laws under a *Timberlane* analysis. Br. at 23-24 (filed Aug. 7, 1992).

[16] *E.g., Kawakita v. United States*, 343 U.S. 717 (1952) (extraterritorial application of treason statute); *United States v. Bowman*, 260 U.S. 94 (1922) (extraterritorial conspiracy to defraud United States); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (piracy on the high seas); *cf. Blackmer v. United States*, 284 U.S. 421, 438-39 (1932) (sustaining extraterritorial subpoena to require U.S. citizen to appear at criminal trial).

effect.[17] Many other generally worded criminal statutes also have been applied extraterritorially to protect significant interests of this country.[18] To adopt a rigid "presumption" against extraterritorial application of U.S. statutes would endanger important federal civil and criminal enforcement efforts in many areas.[19]

---

[17] *United States v. Larsen*, 952 F.2d 1099, 1100-01 (9th Cir. 1991) (applying to high seas narcotics statutes silent as to extraterritoriality); *United States v. Wright-Barker*, 784 F.2d 161, 166-68 (3d Cir. 1986) (same); *United States v. Baker*, 609 F.2d 134, 136-39 (5th Cir. 1980) (same); *United States v. Brown*, 549 F.2d 954, 956-57 (4th Cir.) (applying generally worded narcotics statutes to conduct in foreign country), *cert. denied*, 430 U.S. 949 (1977). *Cf. Ford v. United States*, 273 U.S. 593, 602 (1927) (applying National Prohibition Act to high seas despite its silence on issue of extraterritoriality).

[18] *See, e.g., United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204-06 (9th Cir. 1991) (applying generally worded accessory-after-the-fact statute extraterritorially to murder of U.S. agent abroad); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) (applying U.S. criminal law extraterritorially to international terrorist); *United States v. Thomas*, 893 F.2d 1066 (9th Cir. 1990) (applying extraterritorially statute proscribing creation of obscene materials); *United States v. Parness*, 503 F.2d 430, 439-40 (2d Cir. 1974) (applying RICO extraterritorially), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Noriega*, 746 F. Supp. 1506, 1516-19 (S.D. Fla.) (conspiracy, aiding and abetting, RICO and Travel Act applied extraterritorially to foreign dictator), *mandamus denied, stay denied*, 917 F.2d 1543 (11th Cir. 1990); *cf. United States v. Bank of Nova Scotia*, 691 F.2d 1384, 1389-90 (11th Cir. 1982) (extraterritorial subpoena to investigate money laundering), *cert. denied*, 462 U.S. 1119 (1983).

[19] *See, e.g., United States v. Javino*, 960 F.2d 1137, 1142 (2d Cir.) (reversing Firearms Act conviction on the ground that the government was required to prove that an illegal explosive was manufactured in the United States, on the theory that, under *Aramco*, statute must be presumed not to apply to manufacturer outside this country), *cert. denied*, 61 U.S.L.W. 3355 (1992).

The Lanham Act contains broad jurisdictional language that does not make specific reference to conduct occurring abroad. Nonetheless, this Court held in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), that the Lanham Act applies extraterritorially to prevent trademark infringement abroad that has effects in this country.[20] Similarly, U.S. patent law has been held to apply extraterritorially to prevent infringing effects in this country,[21] as has U.S. copyright law,[22] although neither statute contains an explicit declaration of extraterritorial application.

"The Securities Exchange Act is silent as to its extraterritorial application," as a court of appeals recently observed.[23] But it is well established, both in government enforcement actions[24] and in private damage actions,[25]

---

[20] *See also Reebok Int'l, Ltd. v. Marnatech Enters., Inc.* 970 F.2d 552, 555 (9th Cir. 1992).

[21] *See, e.g., Spindelfabrik Suessen-Schurr v. Schubert & Salzer Maschenfabrik Aktiengesellschaft*, 903 F.2d 1568, 1577-78 (Fed. Cir. 1990) (sustaining injunction requiring foreign defendant to label all machines sold anywhere in the world as: "Not available for sale, use or delivery to the United States").

[22] *See Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988); *Peter Starr Prod. Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440 (9th Cir. 1986).

[23] *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir.) (also holding that federal securities laws apply extraterritorially), *cert. denied*, 112 S. Ct. 638 (1991).

[24] *SEC v. Tome*, 833 F.2d 1086, 1087-88 (2d Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988); *SEC v. Certain Unknown Purchasers*, 817 F.2d 1018 (2d Cir. 1987), *cert. denied*, 484 U.S. 1060 (1988); *United States v. Cook*, 573 F.2d 281, 283-84 (5th Cir.), *cert. denied*, 439 U.S. 836 (1978); *SEC v. Vaskevitch*, 657 F. Supp. 312 (S.D.N.Y. 1987); *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981); *see also SEC v. Minas de Artemisa, S.A.*, 150 F.2d 215 (9th Cir. 1945); Restatement (Third) Foreign Relations Law of the United States § 416, comment a (1987).

that the federal securities laws are applicable to foreign conduct. Like the securities laws, the U.S. commodities laws do not explicitly address the issue, but have routinely been held to apply extraterritorially.[26]

The Jones Act does not specifically state that it applies outside this country, but in *Lauritzen v. Larsen*, 345 U.S. 571, 576-77 (1953), this Court interpreted it to apply extraterritorially where the United States had the predominant interest in the acts at issue.[27] The United States exercises, and this Court has sustained, extraterritorial jurisdiction to impose taxes.[28] The Federal Rules of Civil Procedure do not specifically mention discovery outside of this country, but this Court has held that they do authorize extraterritorial discovery, even in some circumstances where such discovery would conflict with foreign secrecy

---

[25] Dozens of lower court decisions have applied the securities laws extraterritorially in private actions. *See, e.g., Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983); *Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979); *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969); *cf. Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30-31 (D.C. Cir. 1987).

[26] *See, e.g., Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1107-08 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983); *Transnor (Bermuda) Ltd. v. B.P. North Am. Petroleum*, 738 F. Supp. 1472, 1478 (S.D.N.Y. 1990).

[27] Using the balancing formula set forth in its decision, the *Lauritzen* Court declined to exercise jurisdiction over the particular transaction at issue in the case. However, in a later case, this Court held that the same factors supported extraterritorial application of the Jones Act. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970).

[28] Restatement (Third) Foreign Relations Law of the United States §§ 411-12 (1987); *Cook v. Tait*, 265 U.S. 47 (1924).

and nondisclosure laws.[29] To adopt the government's position in this case — that Congress must "clearly express" its "affirmative intention" before any U.S. statute on any subject can be applied outside this country, Br. at 27 — would be contrary to precedent in all of the areas of law discussed above.

B. Congress May Legislate Extraterritorially Based Either on the Effects Principle or on the Nationality Principle of Jurisdiction

Based on the trend illustrated in the cases discussed above, the Restatement (Third) Foreign Relations Law — the first draft of which appeared in 1980, the year §1253(h)(1) was amended — specifically deleted the proposition found in the Restatement (Second) Foreign Relations Law that, as a general matter, U.S. laws did not have extraterritorial effect.[30] The Restatement (Third) §

---

[29] *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 543-44 (1987); *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 204-06, 211-12 (1958).

[30] The Restatement (Third) discussed the decision to omit the notion that U.S. statutes apply only domestically:

> In the past, the jurisdiction of a state to make its law applicable in a transnational context was determined by formal criteria supposedly derived from concepts of state sovereignty and power. . . . Increasingly, the practice of states has reflected conceptions better adapted to the complexities of contemporary international intercourse. . . . Territoriality and nationality remain the principal bases of jurisdiction to prescribe, but in determining their meaning rigid concepts have been replaced by broader criteria[.]

Id., introductory note at 235-37. Against this background, the Court cannot assume that in 1980 Congress intended that all generally worded

402 recognizes that the United States exercises extraterritorial jurisdiction based on the effects of conduct within U.S. territory and on the U.S. nationality of the actors.[31] The Restatement (Third) § 403 goes on to recognize that, where there is an actual conflict with the laws of some other nation, interests of international comity[32] may lead U.S. courts not to exercise jurisdiction if another nation has a clearly greater interest in the person or activity at issue.[33]

In the case at bar, jurisdiction is appropriate under both the nationality principle and the effects principle. 8 U.S.C. § 1253(h)(1) regulates the actions of U.S. nationals — the U.S. government itself — on U.S. flag vessels.[34]

---

statutes would be applied only within this country. *Cf.* Restatement (Third) Foreign Relations Law of the United States § 403, Reporters' Note 2 (older statutes, from time when regulation was less ambitious, are less likely to reflect an intent to reach extraterritorially than more recent statutes).

[31] *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 n.7 (D.C. Cir. 1984) (international law generally recognizes five theories of jurisdiction: objective, territorial, national, protective, and universal), *cert. denied*, 470 U.S. 1003 (1985).

[32] *See Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) ("'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition, which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws").

[33] *See Timberlane*, 549 F.2d at 597 (applying comity principle in antitrust context).

[34] *See United States v. Bowman*, 260 U.S. 94 (1922) (Congress has power to regulate actions of U.S. citizens outside the territorial jurisdiction of the U.S. whether or not the act punished occurred within the territory of a foreign nation); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 381 (1948) (legislation concerning U.S. citizens cannot

Moreover, barring refugees from the United States or admitting them to this country has an immediate and substantial effect here.[35] Even were there a possible conflict with foreign law, U.S. law should still apply, because the interest of the United States in regulating its own immigration policy outweighs the possible interest of any other country.

III. 8 U.S.C. § 1253(h)(1) DOES NOT PRESENT ANY OF THE CONCERNS THAT HAVE LED THIS COURT TO CONCLUDE THAT CERTAIN OTHER U.S. STATUTES SHOULD APPLY ONLY WITHIN U.S. TERRITORY

This Court has concluded on occasion that certain U.S. statutes apply only within U.S. borders. At times, the Court has reached this conclusion on the ground that Congress was concerned primarily with domestic conditions when it enacted the statute.[36] On other occasions, this Court has reached this conclusion because it assumed that Congress desired to avoid conflict with

---

offend the dignity or right of sovereignty of another nation).

[35] *Cf. United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (applying antitrust laws extraterritorially because of effects within the U.S.); *Alfadda v. Fenn*, 935 F.2d 475 (2d Cir.) (same as to securities laws), *cert. denied*, 112 S. Ct. 638 (1991).

[36] *Aramco*, 111 S. Ct. at 1230; *Foley*, 336 U.S. at 285.

foreign law.[37] Neither ground justifies interpreting §1253(h)(1) to apply only within this country.

A. Extraterritorial Application of 8 U.S.C. §1253(h)(1) Is Appropriate Because the Statute Is Inherently International in Focus and Will Not Cause Conflict with Foreign Law

When Congress enacted and amended 8 U.S.C. §1253(h)(1), it was not primarily concerned with domestic affairs, unlike some other statutes this Court has found to apply only domestically.[38] Refugees necessarily come from outside the United States, and the decision to return them to other countries or grant them asylum involves detailed consideration of inherently international matters. The definitions of "refugee" and "asylum" require continual assessment of the threat of persecution that applicants face in foreign countries.[39] If the issue is

---

[37] *See, e.g., Aramco*, 111 S. Ct. at 1230; *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963). *Cf. United States v. Bowman*, 260 U.S. 94, 102 (1922) (criminal fraud statute applies extraterritorially since it provides no possible offense to the "dignity or right of sovereignty" of any other country); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 284-85 (1952) (since no conflict with foreign law, Lanham Act applies extraterritorially); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 543-44 and n. 27 (1987) (extraterritorial discovery is permissible where it is consistent with international comity).

[38] *See Edye v. Robertson*, 112 U.S. 580, 595 (1884) (statutes regulating immigration are adopted pursuant to federal power over foreign commerce). The fact that § 1253(h) was amended in order to conform its language to that of Art. 33 of the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1968, 19 U.S.T. 6223, is conclusive evidence of its international nature. The government concedes that § 1253(h) was amended for this purpose. Br. at 36.

[39] *See* 8 U.S.C. § 1101(a)(42)(A) (1989) (defining who is a "refugee"); 8 U.S.C. § 1158(b) (1989) (defining standard for "asylum").

whether Congress was concerned with conditions outside this country, it would be more plausible to apply a "presumption" in favor of the extraterritorial application of §1253(h)(1) than one against such application.[40]

Similarly, there is no danger that U.S. immigration statutes such as § 1253(h)(1) will conflict with foreign law or international law. The immigration laws simply regulate how the U.S. government itself admits or excludes aliens. Section 1253(h)(1) neither forbids nor requires any action by any private party. There is no possibility that foreign entities will be unfairly subject to inconsistent regulation should a U.S. immigration statute be applied outside this country.[41] A finding of likely persecution may incur the resentment of foreign governments, but Congress has demonstrated that it is willing to incur this consequence when fundamental human rights so require.[42] In any

---

[40] *Cf. United States v. Evans*, 667 F. Supp. 974, 981 (S.D.N.Y. 1987) (Arms Export Control Act inherently international in scope; extraterritorial effect given), *later proceeding*, 844 F.2d 36 (2d Cir. 1992).

[41] The employment and labor cases on which the government relies are therefore inapposite. *See Aramco*, 111 S. Ct. at 1234 (declining to apply antidiscrimination laws extraterritorially because of possibility that employers' duties would conflict under U.S. law and law of place of employment); *Foley Bros.*, 336 U.S. at 284-85 (declining to apply "Eight Hour Law" to U.S. contractors abroad because of possible conflict with local employment laws); *Benz*, 353 U.S. at 147 (declining to apply U.S. labor law to foreign seamen on foreign vessel because of possible conflict with foreign law); *McCulloch*, 372 U.S. at 20-22 (same).

[42] Indeed, the recognition of the international community that refugee claims to asylum are to be decided without reference to relations among governments is implicit in the 1951 U.N. Convention Concerning the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, and its 1967 Protocol Relating to the Status of Refugees, Jan. 31,

event, such resentment does not differ depending on whether the refugee fleeing persecution is within or outside the territory of the United States.

The government infers a rigid "presumption" against extraterritoriality from a line of cases beginning with *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949) and ending with *Aramco*, 111 S. Ct. 1227 (1991).[43] In these cases, the Court declined to apply labor and employment statutes extraterritorially, noting that conflicts with foreign law would necessarily result.[44] Even though the Restatement (Third) Foreign Relations does not recognize a general

1967, 19 U.S.T. 6223, on which the Refugee Act of 1980 is based.

[43] The other primary cases in that line of authority, *McCulloch* and *Benz*, provide the government little support. Although both cases discuss the "presumption," both involve disputes between foreign seamen and their foreign employer while docked at a *United States* port. The ultimate rationale for decision in both cases was legislative history of the statutes at issue declaring that the statutes were meant to protect "American workingmen" rather than aliens. *McCulloch*, 372 U.S. at 20; *Benz*, 363 U.S. at 144. Because they involve activity in the United States, neither case is properly understood as raising extraterritoriality issues. Rather, both are cases where the Court declined to exercise jurisdiction out of comity with other nations that had greater interests in the disputes at issue. *Cf. Wildenhus's Case*, 120 U.S. 1 (1887) (applying U.S. law to murder of one alien by another alien while both aboard a foreign-flag vessel in U.S. waters). *See also Lauritzen v. Larsen*, 345 U.S. 571, 576-77 (1953) (Jones Act applies to foreign sailors on foreign vessel where United States has predominant interest in acts at issue); *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970) (same).

[44] Thus, the Court's recent holding in *Aramco* is grounded on one of the primary rationales for placing limits on the extraterritorial application of U.S. law: avoidance of conflict with foreign laws. Although the language of *Aramco* appears to support the government's assertion of a rigid "presumption," the Court's decision was made in light of the local nature of employment law. There is no reason for this Court to depart from its statute-by-statute approach to extraterritoriality in this case.

"presumption" against extraterritoriality, it does conclude that U.S. extraterritorial jurisdiction is limited "over predominantly local activities, such as industrial and labor relations[.]"[45] That proposition does not justify a rigid rule against extraterritoriality in the wholly different context of immigration law.

B. Because § 1253(h)(1) Regulates the Government's Own Operations, Its Application Should Not Be Limited to U.S. Territory

None of the reasons that have led this Court to apply certain statutes only within this country applies to a statute regulating the operations of the government itself. Section 1253(h)(1) simply removes the government's discretion to return aliens to countries where persecution would threaten their lives or freedom. Because no other country can regulate the actions of U.S. government officials, there is no possibility that such a statute regulating government decisionmaking could conflict with foreign law.[46]

Nor is there any reason to assume that Congress is less concerned with the operations of the U.S. government when they occur outside this country. Were the government's assertion of a rigid "presumption" correct,

[45] Restatement (Third) Foreign Relations Law of the United States § 414 comment c (1987). *Cf. id.* at § 403, Reporters' Note 2: "It is more plausible to interpret a statute of the United States as having extraterritorial reach when the act is international in focus, for example the Trading with the Enemy Act, . . . than when it has a primarily domestic focus, such as the National Labor Relations Act[.]"

[46] As discussed above, this Court has long held that statutes without any express statement of extraterritorial effect can be applied to U.S. nationals abroad, under the nationality principle of jurisdiction. If generally worded statutes are interpreted to apply to U.S. nationals abroad, they necessarily should apply to the government's own operations outside U.S. boundaries.

none of the laws that assure regularity in the workings of government — the Administrative Procedure Act, the Merit Systems Protection Act, the Ethics in Government Act, or the Freedom of Information Act, to name a few — would apply to actions taken or information gathered outside our boundaries.[47] The government does not refer to any case in any court in which a "presumption" against extraterritoriality has been applied to statutes structuring governmental decisionmaking.

C. Applying § 1253(h)(1) to U.S. Flag Vessels on the High Seas Neither Threatens To Interfere with the Sovereignty of Other Nations Nor Presents any Possibility of Conflict with Foreign Law

Even if this Court finds it is appropriate to apply a rigid "presumption" against extraterritoriality with respect to application of a statute to govern the conduct of U.S. government officials within the territory of foreign nations, it should not apply such a rule on the high seas. As stated above, one of the reasons this Court has given for interpreting some other statutes not to apply abroad has been the assumption that Congress was reluctant to interfere with the sovereignty, rights, and laws of other countries.[48] But the "high seas" are open to all countries and are not subject to the exclusive jurisdiction of any

---

[47] None of these statutes specifically states that it applies extraterritorially, although none is limited to actions with purely domestic effect.

[48] *Cf. Weinberger v. Rossi*, 456 U.S. at 32 (considerations against applying U.S. law extraterritorially apply with less force to U.S. enclaves overseas).

sovereign.[49] Thus, the application of § 1253(h)(1) on the high seas neither interferes with the sovereignty of any nation nor presents any possibility of conflict with foreign or international law.[50]

The fact that the government's interdiction of Haitian refugees occurs aboard U.S. Coast Guard vessels on the high seas reinforces the conclusion that U.S. statutes such as § 1253(h)(1) should apply to the program. Each country has jurisdiction over its own flag vessels while on the high seas.[51] Indeed, aboard noncommercial government

---

[49] *United States v. Louisiana*, 363 U.S. 1, 33-34 (1959) ("[t]he high seas . . . are generally conceded by modern nations to be subject to the exclusive sovereignty of no single nation"); *Skiriotes v. Florida*, 313 U.S. 69, 78 (1941) (the high seas belong to no sovereign); *The Hamilton*, 207 U.S. 398, 403 (1907) (same); Law of the Sea: Convention on the High Seas, Sept. 30, 1962, art. 2, 13 U.S.T. 2312, 2314 ("The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty").

[50] *See United States v. Bowman*, 260 U.S. 94, 102 (1922) (applying U.S. criminal law on the high seas) ("We cannot suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intend to include them in the section"); *Beattie v. United States*, 756 F.2d 91, 93-94 (D.C. Cir. 1984) (applying Federal Tort Claims Act to Antarctica, a part of the global commons analogous to the high seas, but not to foreign countries); *Smith v. United States*, 953 F.2d 1116, 1120-24 (9th Cir. 1991) (Fletcher, J., dissenting) (same), *cert. granted*, 112 S. Ct. 2963 (1992). *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) is not to the contrary; in that case the Court held that a statute applying to torts committed "in the United States" did not apply to a tort committed on the high seas 5,000 miles from this country. *Id.* at 440.

[51] Restatement (Third) Foreign Relations Law of the United States § 502(2) (1987) ("The flag state may exercise jurisdiction to prescribe, to adjudicate, and to enforce, with respect to the ship or any conduct that takes place on the ship"). The reluctance of the Court to apply U.S. law to foreign flag vessels was a significant consideration in

vessels on the high seas, no other country can have jurisdiction.[52] Thus, applying § 1253(h)(1) in this case creates no possible conflict with foreign law.

The fact that this statute is to be applied on the high seas makes inapposite Justice Stevens' concurrence in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2150 n.4 (1992), on which the government relies.[53] The regulation at issue in *Lujan* applied the Endangered Species Act to the territory of the United States *and* to the high seas;[54] the issue was whether the Act should be interpreted to apply *also* to the territory of foreign sovereigns, where conflicts with foreign laws might result. By contrast, no possibility of conflict is presented by the application of § 1253(h)(1) on the high seas.[55]

McCulloch and *Benz*; the same concerns should lead the Court to apply U.S. law aboard the U.S. flag vessels here.

[52] Restatement (Third) Foreign Relations Law of the United States § 522(1) (1987) (a "ship owned or operated by a state and used only on government noncommercial service, enjoys complete immunity on the high seas from interference by any other state"); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). *Cf. Foley*, 336 U.S. at 577 (no language in "Eight Hour Law" "gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control").

[53] *Lujan* concerned the Endangered Species Act of 1973, which requires the Secretary of the Interior to consult with other agencies so as to minimize the effects of agency programs on endangered wildlife. The issue in the case was whether this consultation requirement applied to U.S. foreign aid projects in other nations. 112 S. Ct. at 2135.

[54] 112 S. Ct. at 2135, citing 50 C.F.R. § 402.01 (1991).

[55] In any event, two of the three Justices to reach the merits in *Lujan* would have held that the statute under consideration applied without geographic limitation. *Id.* at 2151 (Blackmun & O'Connor, JJ., dissenting). *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 111 S. Ct. 2166, 2170 (1991), on which the government also relies, addressed the extraterritorial application of U.S. law only in dicta.

IV. THE PLAIN LANGUAGE AND HISTORY OF §1253(h)(1) OVERCOME ANY ARGUMENT AGAINST ITS EXTRATERRITORIAL APPLICATION

As the Second Circuit correctly held, whatever the strength of any presumption against extraterritoriality in the context of immigration law, this canon of statutory interpretation is easily overcome by the language and history of § 1253(h)(1). That section reads:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[56]

As the government concedes (Br. at 33), the term "alien" is defined to include aliens outside the territory of the United States.[57] The 1980 amendment to § 1253(h) supports the application of this plain language to government actions involving aliens outside the United States. Before that amendment, the statute read:

> The Attorney General is authorized to withhold deportation of any alien *within the United States* to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.[58]

As the Second Circuit below held, the deletion of the territorial limitation makes it explicit that Congress intended the statute to include aliens outside the United

---

[56] 8 U.S.C. § 1253(h)(1) (1989).

[57] 8 U.S.C. § 1101(a)(3) (1989).

[58] 8 U.S.C. § 1253(h) (1970) (emphasis supplied).

States.[59] This change in language overcomes any "presumption" against extraterritoriality.[60] To hold otherwise would exalt a judicially created rule for determining congressional intent beyond its appropriate status as a mere tool of neutral statutory analysis.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

OF COUNSEL

STEVEN M. SCHNEEBAUM
JANELLE M. DILLER
INTERNATIONAL HUMAN RIGHTS LAW GROUP
1601 Conn. Ave., N.W.
Washington, D.C. 20009
(202) 232-8500

WILLIAM T. LAKE
CAROL F. LEE
W. HARDY CALLCOTT*
SUSAN P. CRAWFORD
KATARINA MATHERNOVA
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Amicus Curiae

* Counsel of Record

December 21, 1992

---

[59] As the government concedes (Br. at 50 n.40), this was the contemporaneous interpretation of the 1980 amendment by the Departments of Justice and State. Contemporaneous administrative interpretations shed significant light on the intent of the political branches at the time of enactment. *Cf. Aramco*, 111 S. Ct. at 1235 (deferring to administrative interpretation most nearly contemporaneous with passage of statute, rather than to more recent change in interpretation).

[60] As noted above, this brief is focused on a discussion of the extraterritorial application of § 1253(h)(1). Other briefs filed in this action will address in detail the legislative history of the statute.